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No. 96-1173

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CHARLES H. BEEMAN, et al.,

Petitioners,

v.

DEAN COHEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND *AMICI CURIAE* BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

The Community College League of California ("League") and Educational Legal Alliance of the California School Board Association ("Alliance") respectfully move this Court, pursuant to Supreme Court Rule 37, section 2(b), for leave to file the brief submitted herewith, as *amici curiae* in support of the Petition for Certiorari ("Petition") of Petitioners Charles H. Beeman, et al. ("Petitioners"). This motion is necessary because counsel for Respondent Dean Cohen, Stephen F. Rohde, refused consent to filing of the brief.

As is more fully explained in the brief, the League and the Alliance are interested in the present case because they represent hundreds of community colleges and school districts across California that have adopted sexual harassment policies as required under federal and state anti-discrimination laws. These organizations are concerned that the opinion of the Ninth Circuit could significantly affect the enforcement of these policies which are substantially similar to the one at issue in this case and subject California school and colleges to inconsistent legal liabilities under federal law.

The brief submitted by the League and the Alliance addresses the predicament the appellate decision creates for California's public educational institutions, which are striving to prevent sexual harassment in their workplaces and educational settings, while at the same time honoring First Amendment rights. The subject of the considerable impact of the decision on California's public educational institutions is not fully treated in the Petition of the Petitioners, individual administrators who do not represent the institutions' interests.

Counsel for the League and the Alliance, who have drafted the brief, are familiar with the issues presented in this

case. They have reviewed the Ninth Circuit's opinion, the district court order, the appellate briefs filed by the parties and *amicus curiae*, and the Petition. The League's Counsel of Record has also discussed the issues at length with Petitioners' counsel, Susan Boyle, who granted consent on behalf of Petitioners for the filing of the *amici curiae* brief.

Wherefore the League and the Alliance respectfully move that this Court grant leave to file the brief of *amici curiae* submitted herewith.

Dated: February 25, 1997

Respectfully submitted,

Marilyn Kaplan

Marilyn Kaplan

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

California law requires every educational institution in the state to adopt and enforce a written policy prohibiting sexual harassment. These duly adopted and administered sexual harassment policies generally mirror the applicable state and federal laws and regulations, including the portions that outlaw "hostile environment" sexual harassment.[1/] The college's policy invalidated in this case is not anomalous, but is instead virtually identical to those standardized policies in effect throughout California.

In finding the sexual harassment policy of San Bernardino Valley College ("College") "unconstitutionally vague as applied," the Ninth Circuit's decision challenges the sexual harassment policies applied by nearly every school district and community college in California. California's educational institutions find themselves in a predicament: on the one hand, they are mandated to enforce their policies or face *per se* liability to victims of sexual harassment, such as the student in this case; on the other hand, such enforcement may violate First Amendment free speech rights, as successfully asserted by the professor here.

The Community College League of California ("League") is a non-profit, public benefit corporation whose membership consists of the 71 local community college districts in the state. The districts together serve hundreds of

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[1/] A representative sample of sexual harassment policies from California community college districts and school districts which was attached to the brief of *amici curiae* at the Ninth Circuit has been omitted here.

thousands of students and employ thousands of professors and other staff. The League represents its member districts on issues of statewide importance to community colleges in California. The League provides numerous services to its members, including advice and assistance on the interpretation and implementation of laws affecting community colleges.

The Education Legal Alliance ("Alliance") is a nonprofit association of public school district (grades K-12) governing boards and county boards of education. The Alliance represents its members, more than 650 of the state's 1,000 school districts, on issues that have statewide consequences for public education. The Alliance's activities include, as in this matter, joining in litigation where the interests of public education are at stake.

The League and the Alliance are concerned that the appellate decision has caused great uncertainty among educational institutions as to how they are to fulfill their seemingly conflicting legal obligations. Increasingly, this unavoidable and as yet unresolved dilemma at the intersection of sexual harassment law and the First Amendment is surfacing in court cases involving schools and colleges and their teachers and students. *Amici curiae* thus urge this Court to grant the petition for writ of certiorari and provide much-needed guidance as to whether policies like the one at issue here are constitutionally permissible and, if not, what modifications are required to bring such policies within constitutional parameters.

ARGUMENT

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION CREATES SERIOUS DOUBT ABOUT THE CONSTITUTIONALITY OF ENFORCING THE SEXUAL HARASSMENT POLICIES OF VIRTUALLY EVERY CALIFORNIA PUBLIC EDUCATIONAL INSTITUTION

I. THE COLLEGE'S POLICY REFLECTS CURRENT FEDERAL AND STATE LAW ON PREVENTING SEXUAL HARASSMENT

Sexual harassment has been recognized for more than ten years by this Court as a form of illegal sex discrimination. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 91, L.Ed.2d 49, 106 S.Ct. 2399 (1986). California law is in accord. Cal. Gov. Code. § 12940(h)[2]/; *Accardi v. Superior Court*, 17 Cal.App.4th 341, 348 (1993). Recently, this Court held that sexual harassment in an educational setting was actionable. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992)[3]/. Moreover, sexual harassment has been held to violate the Fourteenth Amendment's Equal Protection clause. *Bator v. Hawaii*, 39 F.3d 1021, 1027 (9th Cir. 1994).

Sexual harassment takes two forms: (1) *quid pro quo*, in which favorable treatment is conditioned upon acceding to

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[2]/ Cal. Gov. Code § 12940(h)(1) specifically outlaws harassment as a form of discrimination.

[3]/ *See also Governing Board of ABC Unif. School Dist. v. Haar*, 28 Cal.App.4th 369 (1994) (teacher's sex harassment of students cause for dismissal).

unwelcome sexual advances; and (2) hostile or abusive environment, in which gender is a substantial factor in the creation of a hostile environment. *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991); *Accardi*, 17 Cal.App.4th at 348. Relying on regulations promulgated under Title VII, 42 U.S.C. section 2000e, the *Meritor* court recognized that forcing an employee to work in an environment which is hostile based upon her or his gender constitutes illegal discrimination. 477 U.S. 57, *citing* 29 C.F.R. § 1604.11. This Court held that Title VII is violated where the workplace is permeated with "discriminatory intimidation, ridicule, and insult," 477 U.S. at 65, that is "sufficiently severe or pervasive to alter the condition of the victim's employment and create and abusive working environment." 477 U.S. at 67.

Since *Meritor*, this Court has further instructed that a hostile environment will be found where it "would reasonably be perceived, and is perceived, as hostile or abusive." *Harris v. Forklift Systems*, 510 U.S. 17, 22, 126 L.Ed.2d 295, 114 S.Ct. 367 (1993).[4]/ This Court further noted that, "[t]his is not,

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[4]/ The court in *Fisher v. San Pedro Peninsula Hospital*, 214 Cal.App.3d 590 (1989), in interpreting California's anti-discrimination law, defined a hostile environment in similar terms:

> '[s]exual harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives its victim of her statutory right to work in a place free of discrimination, when the sexually harassing conduct sufficiently offends, humiliates, distresses or intrudes upon its victim so as to disrupt her emotional tranquility in the workplace, affect her ability to perform her job as usual, or otherwise interferes with and undermines her personal sense of well being.'

Id. at 608, *quoting* California's Fair Employment & Housing Commission decision in *DFEH v. Bee Hive Answering Service*, FEHC No. 84-16 at pp. 18-19 (1984).

and by its nature cannot be, a mathematically precise test"; instead, what constitutes a hostile environment must be determined on a case by case basis. 510 U.S. at 22-23.

Both federal and California courts have explained that hostile environment harassment may occur in a variety of ways: pervasive use of derogatory and insulting terms relating to women; sexual epithets; and sexually explicit remarks. *Accardi* 17 Cal.App.4th at 348-49. *See, e.g., Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994) (frequent use of derogatory terms and sexual epithets constituted hostile environment); *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989) (hostile environment found where, *inter alia*, female employees subjected to sexual comments and sexual advances). While the Equal Employment Opportunity Commission's ("EEOC") Guidelines, 29 C.F.R. section 1604.11, discussed below, specifically address conduct that is sexual in nature, sexual harassment need not involve sexual activity or language to be actionable. Abusive behavior or language of a non-sexual nature, when sufficiently patterned or pervasive and directed toward individuals because of their gender, may also give rise to discrimination liability. *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987); *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985); *Accardi*, 17 Cal.App.4th at 344, 348. In literally hundreds of hostile work environment sexual harassment cases, beginning with the seminal case of *Meritor*, employers, including public employers like school districts and community colleges, have not just been permitted to try to prevent verbal acts of harassment from creating a hostile environment in their workplaces--they have been *required* to do so.

This Court has applied the law on hostile work environment to the educational setting. *Franklin*, 503 U.S. 60. The *Franklin* court held that when a teacher sexually harasses

a student, that teacher discriminates on the basis of sex within the meaning of Title IX, 20 U.S.C. section 1681, and the educational institution may be liable for such harassment.[5]/ 503 U.S. at 75.

In 1984, the California legislature made sexual harassment in the workplace and in the educational setting virtually synonymous, defining sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting," where, among other things, "the conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance,[6]/ or of creating an intimidating,

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[5]/ *Cf. Intelkofer v. Turnage*, 973 F.2d 773, 777 (9th Cir. 1992), citing 29 C.F.R. § 1604.11, subd. (d) (employer liable if it knew or should have known of the conduct, yet failed to take immediate and appropriate corrective action). The Ninth Circuit has also strongly implied, *in dicta*, that school teachers and administrators have a duty under Title IX to curb student-to-student sexual harassment. *Clyde K. v. Puyallup School College No. 3*, 35 F.3d 1396, 1401 (9th Cir. 1994) ("given the extremely harmful effects [peer] sexual harassment can have on young female students, public officials have an especially compelling duty not to tolerate [sexually explicit remarks] in the classrooms and hallways of our schools"); *see also Doe v. Petaluma City School District*, 54 F.3d 1447, 1451 (9th Cir. 1994) (suggesting, but not deciding, that a school administrator may be likened to an employer and thus may be liable for peer sexual harassment for failing to curb such conduct). Indeed, district courts have already held that school administrators may be liable for tolerating peer sexual harassment. *See, e.g., Oona R.-S. v. Santa Rosa City Schools*, 890 F.Supp. 1452 (N.D. Cal. 1995); *Doe v. Petaluma City School Dist.*, N.D. Cal. Case No. C 93-00123 CW, July 22, 1996 Order Granting Plaintiff's Motion for Reconsideration (unpublished opinion).

[6]/ Arguably, the use of "negative impact" makes this provision even broader than the EEOC Guidelines, 29 C.F.R. § 1604.11(a), and the

hostile, or offensive work or educational environment." Cal Educ. Code § 212.5.

The College's policy[7]/ defines harassment in conformity

College's policy at issue. Both the Guidelines and the College's policy speak of the purpose or effect of "unreasonably interfering with," rather than "of having a negative impact upon" the individual's performance. This "unreasonably interfering with" language harmonizes with the case law that requires that an environment be objectively hostile in order to be actionable. *See Harris*, 510 U.S. at 22, 126 L.Ed. at 302; *Ellison*, 902 F.2d at 879.

[7]/ As the Ninth Circuit noted in its opinion, the College's policy defines sexual harassment as

> "unwelcome sexual advances, requests for sexual favors and other verbal, written, or physical conduct of a sexual nature, it includes, but is not limited to, circumstances in which:
>
> 1. Submission to such conduct is made explicitly or implicitly a term or condition of a student's academic standing or status.
>
> 2. Such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment.
>
> 3. Submission to or rejection of such conduct is used as the basis for academic success or failure."

However, what is not included in the Ninth Circuit's opinion invalidating the college's policy on grounds of "vagueness," is that the policy further defines sexual harassment to specifically include:

> "1. Verbal harassment - Derogatory comments, jokes or slurs;
>
> 2. Physical harassment - Unnecessary or offensive touching, or impeding or blocking movement;
>
> 3. Visual harassment - Derogatory or offensive posters, cards, cartoons, graffiti, drawings, or gestures; and

with the EEOC Guidelines, 29 C.F.R. section 1604.11(a),[8]/ and California's Education Code section 212.5, and offers illustrative examples of improper conduct that virtually repeat *verbatim* state regulatory guidelines.[9]/ Comparing the College's

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4. Sexual favors - Unwelcome sexual advances, requests for sexual favors and other verbal, written, or physical conduct of a sexual nature upon which is conditioned any educational/academic benefit, or conduct which unreasonably interferes with a student's academic performance or creates an offensive learning environment."

[8]/ 29 C.F.R. § 1604.11(a) provides:

> Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of any individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

[9]/ In setting forth forbidden employment practices, California's regulations provide:

(1) Harassment includes but is not limited to:

(A) Verbal harassment, *e.g.*, epithets, derogatory comments or slurs on a basis enumerated in the Act.

(B) Physical harassment, *e.g.*, assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on a basis enumerated in the Act.

policy with case law, statutes and administrative regulations, demonstrates that the policy not only tracks the law defining sexual harassment, it is in some regards more specific and narrow as it focuses on sexual activity and language, and prohibits conduct that rises to the level of an "unreasonabl[e] interfer[ence]."

II. THE CONCLUSION THAT THE COLLEGE'S POLICY IS UNCONSTITUTIONALLY VAGUE AS APPLIED IMPLICATES THE LEGAL STATUS OF THE SEXUAL HARASSMENT POLICY OF VIRTUALLY EVERY COMMUNITY COLLEGE AND SCHOOL DISTRICT IN CALIFORNIA

The Ninth Circuit's decision places the College, and all other California educational institutions whose sexual harassment policies model the EEOC Guidelines and California regulations, in a serious predicament. Because the College's policy embodies the current parameters of sexual harassment law, the Ninth Circuit's decision creates great confusion as to how educational institutions can promulgate and enforce the sexual harassment policies required of them without violating free speech.[10/] Anti-discrimination law requires that these

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(C) Visual forms of harassment, *e.g.*, derogatory posters, cartoons, or drawings on a basis enumerated in the Act, or

(D) Sexual favors, *e.g.*, unwanted sexual advances which condition an employment benefit upon an exchange of sexual favors.

Cal. Code Regs., title 2, § 7287.6(b)(1).

[10/] As noted above, the policy specifically prohibited "[d]erogatory comments, jokes or slurs" and "[u]nwelcome . . . verbal, written, or physical conduct of a sexual nature upon which is conditioned any educational/academic benefit, or conduct which unreasonably

institutions implement and enforce policies that prohibit sexual harassment, yet the Ninth Circuit's reasoning results in the unavoidable conclusion that such enforcement impinges on First Amendment rights.

As discussed above, both federal and state law require California educational institutions not merely to adopt policies against sexual harassment but also to *apply* those policies. When application of the policy compels the determination that harassment has indeed occurred, it is then the obligation of the institution to take action against the harasser to stop the illegal conduct. *See Franklin*, 503 U.S. at 74-75; Cal. Educ. Code § 212.6. The College would thus have been remiss, and potentially liable to the complaining student, if it failed to apply its policy and, if it concluded the policy had been violated, to take corrective action.

The professor's behavior in this case would seem to be *exactly* the sort of conduct the College's policy was designed to redress. As the Ninth Circuit itself noted, Professor Cohen placed "repeated focus on topics of a sexual nature" and frequently used profanity, vulgarities, derogatory language and sexual innuendo, which the complaining student believed were directed at female students. In addition, the district court cited evidence that Cohen distributed and/or read to his students articles he had written for *Playboy* and *Hustler* magazines, which referenced his own erection and pornographic films, and that he made a *quid pro quo* offer to the complainant that "if she met him in a bar he would help her get a better grade." *Cohen v. San Bernardino Valley College*, 883 F.Supp. 1407, 1410 (C.D. Cal. 1995).

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interferes with a student's academic performance or creates an offensive learning environment."

When the complaining student asked Cohen if she could write about something other than the assignment topic of pornography, he refused. Unable to bring herself to write about this topic, she failed the class. The College's faculty grievance committee, the College's president, and then the College board of trustees all found the professor's conduct violated the policy. After a trial on stipulated facts, the district court reached the same conclusion.

Nevertheless, the Ninth Circuit found that "Cohen's speech did not fall within the core region of sexual harassment as defined by the Policy." The appellate opinion does not define what is considered to be the "core region" or why this speech and conduct falls outside that purview. Nor did the Ninth Circuit decision address the notion that the speech at issue was either unprotected altogether or was subject to incidental abridgement in order to accomplish the compelling public interest of preventing invidious discrimination. *See R.A. V. v. City of St. Paul*, 505 U.S. 377, 389-90, 120 L.Ed. 2d 305, 112 S.Ct. 2538 (1992); *Roberts v. United States Jaycees*, 468 U.S. 609, 628, 82 L.Ed.2d 462, 104 S.Ct. 3244 (1984).

While the Ninth Circuit held that the policy was "vague as applied," it is difficult to imagine how, under a reasonable construction of the policy, conduct like Cohen's would *not* be prohibited. *See United States v. Dischner*, 974 F.2d 1502, 1509 (9th Cir. 1992) (vagueness as applied standard considers if the conduct at issue in a case is prohibited under a "reasonable construction of the statute"). Furthermore, the Ninth Circuit's finding that the policy did not provide Cohen with adequate notice that his "teaching methods" offended the policy suggests that the Ninth Circuit actually considered the College's policy to be vague on its face. This runs contrary to this Court's admonition that the definition of hostile environment sexual harassment is not capable of exact formulation. *Harris*, 510

U.S. at 22-23. The Ninth Circuit's constitutional objection to the "*ad hoc* basis" on which it found the College had applied its policy to Cohen also contradicts this Court's and the EEOC's instruction that what constitutes a hostile environment must ultimately be determined on a case by case basis. *See Harris*, 510 U.S. at 23; 29 C.F.R. § 1604.11(b).

Moreover, the Ninth Circuit apparently disregarded the fact that the College, in implementing its policy, acted as a government employer and thus ". . . has far broader powers than does the government as sovereign."[11]/ *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686, 697 (1994). This Court in *Waters* instructed that while "speech restrictions must generally precisely define the speech they target," government employees are not afforded such procedural protections.[12]/ 128 L.Ed.2d at 698. For example, a government employer could "prohibit its employees from being 'rude to customers,'" yet the same restriction would be unduly vague when applied to the public at large. *Id.* As the district

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[11]/ As the Ninth Circuit did not distinguish between a governmental body acting as sovereign versus its role as employer, it did not analyze what public employee speech is protected and the balancing test described in *Waters*, 128 L.Ed.2d at 694-96 (to be protected, speech must be on a matter of public concern, and the employee's interest of self-expression on the matter must not be outweighed by any injury the speech may cause the government employer in carrying out its functions). The district court appropriately undertook such an analysis. *See* 883 F.Supp. at 1415-1419. *Cf. Dambrot v. Central Michigan University*, 55 F.3d 1177, 1185-90 (6th Cir. 1995) (college basketball coach's use of the word "nigger" to motivate his players was not on a matter of public concern and thus not protected speech).

[12]/ Nevertheless, the Ninth Circuit used the principle that regulations on "First Amendment activities must be narrowly drawn to address only the specific evil at hand," as a touchstone for finding the subject policy too "vague as applied."

court in this case aptly noted, if a prohibition on being "rude to customers" passes constitutional muster, surely the sexual harassment policy at issue is not unduly vague. 883 F.Supp. at 1421.

Other circuit courts have struggled with this as "yet unresolved dilemma facing courts adjudicating claims . . ." at the juncture of sexual harassment law and the First Amendment and have bemoaned the paucity of Supreme Court precedent providing guidance in this area. *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 195 (5th Cir. 1996). As the Fifth Circuit previously observed:

> Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech.

DeAngelis v. El Paso Municipal Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995), *cert. denied*, __ U.S. __, 116 S.Ct .473, 133 L.Ed. 403 (1995).

Assuming, *arguendo*, that the Ninth Circuit's vagueness analysis of the policy *is* apt, then, by implication, the First Amendment is necessarily pitted against anti-discrimination law. If the College's policy is inadequate to give fair warning as to what speech is prohibited, then the policies of virtually *all* California's educational institutions, and the federal and state regulations and case law that the policies reflect, are also of questionable validity. While this clash between the First Amendment and the Fourteenth Amendment's equal protection

clause and anti-discrimination law is directly implicated by the Ninth Circuit's reasoning, the decision offers no resolution or even analysis of the problem.

Friction between sexual harassment policies and free speech principles has been acknowledged by several courts of appeal, *see, e.g., Weller*, 84 F.3d 191, and *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1296 n. 7 (9th Cir. 1992) (Kozinski, J., dissenting), *rev'd* __ U.S. __, 115 S.Ct. 464 (1994). Academia has also addressed the subject, *see, e.g.*, Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L.Rev. 1791 (1992); Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment - Avoiding a Collision*, 37 Vill. L.Rev. 757 (1992); Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 Ohio St. L.J. 481 (1991). All have expressed the desire that this Court provide guidance to the courts and the public on this important legal and social issue.

CONCLUSION

Under the reasoning of the Ninth Circuit's decision, educational institutions may be liable no matter what they do: if they enforce sex harassment policies that model federal and state regulations they may be liable for free-speech violations, yet if they do not implement and enforce such policies they face discrimination liability. This Court should grant the

petition for certiorari and clarify the law regarding these "troubling" questions, which have most serious ramifications for our state educational institutions.

Dated: February 25, 1997

Respectfully submitted,

Marilyn Kaplan

Marilyn Kaplan

Counsel of Record